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DHARMASASTRA AND MODERN INDIAN SOCIETY: A PRELIMINARY EXPLORATION

Dr. Shaileshkumar Naranbhai Savaliya

LL.M., Ph. D, Assistant Professor, Gayatri Gurukrupa Law College, Lathi (Gujarat)

ABSTRACT

How do ordinary human beings make the ordinary, or, on occasions the momen- tous, decisions of everyday life? Is it simply an existential reaction? If so, is the instancity hedged in by the virtue or malice of their past? And, is this past weakly or mightily influenced by the traditions that they are a part of and which are a part of them? Our inquiry does not just relate to the reactions of people but the reasons on which these reactions are founded. In other words, we are concerned with the humanness of the reaction. In an elegant passage Karl Marx distinguishes the uniqueness of man's labour power when compared with the breathtaking effi- ciency of ants, bees and spiders.

INTRODUCTION

But what distinguishes the worst architect from the best of bees is this, that the architect raises his structure in imagination before he erects it in reality. At the end of every labour process, we get a result that already existed in the imagination of the labourer at its commencement. He not only effects a change in the material on which he works, but he also realises a purpose of his own that gives law to his modus operandi and to which he must subordinate his will.

When ordinary people think through or make the simple or complex decision of life, they draw upon a second order reservoir of ideas and beliefs which form a backdrop to their thoughts and actions. No doubt in certain cases, this second order framework of normativity is weaker than in others. In some cases, it draws upon an explicit oral or written tradition, in others it remains an inarticulate premise. We are speaking now of those traditions which are imbricated and woven into the fabric of everyday life and which influence how people view themselves, and their relationship with others and things around them. The strength of such traditions stem from their relevance to every day life. They dilute and disappear when they cease to have meaning to the very social processes of life in civil society from which they draw sustenance and strength. Unfortunately, too little attention is paid to the ideology of everyday life. Yet it is this ideology of everyday life in civil society that forms the basis on which we found our lives and view the network of relationships within which we live. This ideology of everyday life is not just concerned with those dispositive events which require a decision or forbearance but with how we think, what we believe and our reasons for action or inaction. It serves as both a justification to oneself as well as an explanation to others of the rightness and wrongness of things.

The dharmasastra of India

The dharmasastra of India seeks to portray and influence the ideology of everyday life of the Hindus and other communities. Located in spiritual literature, it, nevertheless, concerns itself with the nature of civil society. Neither the edicts of a king nor the pronouncements of judges or juriconsults, it authoritatively pronounces on the legal relationship between persons inter se and the state while diluting the differences between legal and moral obligation. The injunctions contained in the sastra do not, in the main, look to legal enforcement as a remedy. No doubt civil society created a multitude of institutionalized mechanisms for the enforcement of the sastra and used a variety of moral, social and other sanctions to secure that enforcement. Yet, the strength of the sastra has been its appeal to, and support from, civil society. And, if history offers proof, the sastra, amidst innumerable variations and transformations, has offered guidance and secured compliance from people in civil society for thousands of years in a plentitude of situations through successive conquests and the political uncertainty of the rise and fall of innumerable hostile governments and empires. If the sastra survived. it was because of a deeply seated belief in the holistic order of things. But, in addition, the sastra displayed a strength which was never wholly out of touch with the pragmatic demands of every day life of those whose purposes it subserved; and the need to meet these demands with both relative clarity and considerable accommodation. The central purpose of the sastra was to preserve dharma (righteousness) and ensure that people live according to dharma. It is dharma that holds a society together. Without dharma there is chaos, confusion and unworthi- ness. But, dharma is not just that which holds together. It has to be understood as part of the sastric system without which it is no more than a pleasing idea devoid of meaning. As a modern authority on the sastra puts it:

Dharma is essentially a rule of interdependence, founded on a hier- archy corresponding to the nature of things and necessary for the main- tenance of social order. To break away from it is to violate one's destiny and to expose oneself to the loss of one's salvation.

Thus, while dharma can be treated as a universal concept seeking to identify those principles of righteousness that hold civil society together, such a univer- salization of the concept of dharma cannot observe the specific commitment of the sastra a particular view of the good life. Nor can it ignore the fundamental vision of the sastra that the temporal order is linked to a cosmic order about which we know little but of which our earthly lives are a part.

It is difficult to contexualise the historicity of the sastra. Broadly speaking.. the sastra (in its broadest sense) follows a certain historical order, starting with the vedas, through various texts

including the great epics, the Ramayana and Mahabharata, the sutras until the smritis, amongst whom the most well known is the Manu smriti. Later various commentators (nibandkars) wrote explanatory digests, expounding the wisdom of the smritis. It is possible but not without exciting some controversy to place the smritis in some kind of chronological order on the basis of their internal linguistic structure and the cross referencing of texts by the smriti and nibandkars. This is an entirely different exercise from placing the smritikars in order of pre-eminence preference in the matter of their authoritativeness.

What has eluded both historians and jurists is providing the exact historical context in which a particular smriti was written and the reasons for the portrayal of a particular view of civil society. In a remarkable attempt to do so, Jayaswal's Manu and Yajnavalkya seeks to show that Manu's treatise was written as an apologia for Brahmin ascending the throne, which allegedly accounts for a text permitting a Brahmin to become senapati (commander-in-chief) or even king. But, Jayaswal goes further to explain the difference between Manu and Yajnavalkya on the basis of the social and political context in which the smritis were allegedly written. Such an account has rightly been characterised as standing at the "bound- aries of brilliance and guesswork". Even if it is possible to date the sastra with some approximation, it is almost impossible to indicate the precise circumstances that set the stage for, or provoked, a particular text or interpretation. This impossibility gets even more confounded when the evidence points to different parts of a text being added at different times. But, if the lack of historical explanation is a loss to us, it was a gain to the authority of the sastra.

The texts had no past only a relevance. Historical facts could not be adduced to explain their origins or de-limit their application to a particular set of facts or de-legitimate or invalidate their significance in the context of their historicity. This lay open the converse possibility that the sastra would invite free interpretation restricted only by the text. The possibilities of free interpretation were curtailed in three ways. (i) The first and more obvious institutional method was to recognise the injunctive importance of sadachara (good practice) and repose the power to determine the meaning of such good practice in a parishad (committee) of Brabmins truly learned in the sastra. Eventually, a concession was made to local interpretation with the caveat that such local Brahmins should be learned in the sastra. (ii) The second method of controlling the interpretation of the sastra was the evolution of an interpretative tradition encapsulated in the juristic hermenutics of Jaimini which had a profound influence on interpretation of the sastra and kept it within manageable limits. There is a very important instance where their Lordships in the Privy Council in British India used - and confused the use of these hermenutic principles in deciding whether an only son can be given in adoption.

The Purva Mimamsa

The Purva Mimamsa which enunciates these rules of interpretation had stated that where a reason is assigned for any prescription, the text should be treated as recommen- datory rather than injunctive. To this the Judicial Committee responded by assuming that "an injunction not expressed in unambiguous terms of absolute command...but resting on a reason... address(es) the moral sense of (its)...bearers than to their duty of implicit obedience.

This illustration serves as a warning of what can happen to a system of interpretation in insensitive and unskilled hands. The end result was that the court failed to appreciate the importance of sonship which was given as the reason for the rule. Whatever the final answer to any particular question, it is clear that interpretative rules of such complexity could not have successfully checked wayward interpretations of the sastra. The development of such an interpretative system had to be reposed in hands of persons of considerable skill and acumen. And, even that by itself would not vouchsafe their influence in civil society. In order to be influential in local settings, such a system of interpretation would have to be reasonably well known and creatively understood outside the academies in which it was born and grew. (iii) The third technique of the sastra was to accept and discipline what it could not control. What the sastra did permit was a recognition of custom as a source of law,10 requiring the king and others to recognise and accept the "custom of countries, families and castes," but, in some cases, to give it over-riding authority. It was also accepted through the doctrine of kala (epoch) that the laws of each kala may vary from the preceding or succeeding epoch. 13 We can read too much and too little into the sastric recognition of custom and the doctrine of kala. To read too much would be to suggest that the sastra permitted an unlimited flexibility in accepting deviation from sastric prescriptions. To read too little would be to marginalise the signift- cance of these important sastric techniques. What is significant is that the sastra recognised that a strict compliance with dharma was not possible. Concessions were made to the insistent rebellions of every day life if they acquired the pattern of a tradition. In this way, honour was satisfied without undermining the authority of the sastra and by accepting deviations as part of the order of things. The accommodating lack of rigidity in the sastra was not the reason for its acceptance in civil society. Its acceptance arose out of an internal act of faith in the minds of people as part of a comprehensive holistic system of belief. It was not as if every particular rule of vyavahara was tested for its inherent goodness or usefulness. No doubt some where rejected, sab silentio, as cumbersome. But, what was accepted was the whole system as a pre-ordained and workable system. It is impossible to comprehend the vyavaharic rules without understanding the assumptions on which the whole system was founded. If it was obeyed it was because it was part of one's destiny to do so, with a consequential loss of salvation if one did not.

Legal scholarship has tended to concentrate on the vyavahara akanda (civil prescription) in contradistinction to the acara (religious customs and rituals) and prayaschitta (penance) parts of the smriti. This has led to a notional separation of the vyavahara provisions which were treated as relatively autonomous rules of law, de hors the moral and religious invocations from which they indubitably drew authority and respect. Thus, in the nineteenth century, when the Privy Council dealt with the problem of extracting legal roles from what it called a "mixture of morality, religion and law", it failed to take into account the symbiotic relation- ships between the various invocations and proceeded to import precisely that "inflexible rigidity, never contemplated by the law givers." Yet both the smriti writers and nibandikars (commentators) did not intend these prescriptive state- ments in the vyavahara akanda to be read in legal isolation. It is important to reassert that these rules operated in civil society as part of the general ideology of everyday life. It was on the nexus between the various vyvaharic prescriptions and the moral configuration of which they were a part that the social authority and relevance of these prescriptions depended. Without this moral authority, these prescriptions were meaningless. Backed by such moral authority, the injunctions voiced by the sastra became ex cathedra, and almost sui generis.

Let us consider what these vyavaharic prescriptions sought, or succeeded in achieving. We are concerned now with the external

social framework which the sastra sought to impose on civil society. First and foremost, the sastra managed to prescribe and regulate the inter-relationship between various races and groups. This is very important to the understanding of the sastra which was calculated to achieve what we might call a kind of in-egalitarian barmony between races and in support of a particular view of the relationship between various groups. The sastric rules prescribed a social stratification based on the doctrine of varmas Legend attributes the distribution of peoples into varnar on the symmetrical basis that the Brahmins were the mouth, the Kshatriyas the arms, the Vaishyas the things and the Sudras the feet of the first male, purusha. From this are defined four explicitly stated functions:

Brahma has placed brahman (sacred learning) in the Brahmins with the duty and the right to devote themselves to study and teaching, to perform sacrifices for themselves and for others, to make and receive donations. in order to secure protection of the vedas.

In the Kshatriyas, he has placed ksatra (force) with the duty and the right to devote themselves to study, to make sacrifices and donations, to exercise force of arms and to protect the wealth and lives of created beings, in order to secure the good government of the country.

In the Vaishyas he has placed the power of work, with the duty and the right to devote themselves to study, to make sacrifices, to make donations in order to cultivate the soil, to do business, to take care of cattle in order to the development of protective labour. Upon the Sudras he has imposed the duty of serving the three higher.

In all this, one can immediately sense the relative isolation of the Sudras whose duty is to serve the higher varnas or attend to servile and menial tasks. The Sudras were presumably non-Arya, but who were assimilated into civil society. and, to whom the sastra has assigned a position. Discontent was bought off by reference to the possibility that if they did their duty they would obtain the possible recompense of being re-born in the higher varnas. Yet since some of the non-Arya remained kings, Mano attributes to them a status in the fourth varna on the basis that they were once Kshatriayas who, having fallen, have become Sudras. Yet the doctrine of varnas is more elaborate and does more than deal with the problems of racial mix between Arya and non-Arya; and amongst lesser caste groups inter se. It prescribes and settles the basis on which group life is to exist in civil society, affirming a cast iron principle of birth to determine belonging to a group but predicting, in part, the innumerable ways in which social usurpation would take place by marriage, adoption, merit or otherwise.

Second, the sastra sought to enforce and sustain a particular power and property structure in civil society. The primary institution through which this power and property was instrumented was the joint family. Property, thus, be- longed to the joint family. Exceptions were made in favour of the king, religious endowments and women who could also own property, but this did not disturb the primary focus of ownership of property vesting in the joint family with shares in the father and sons. However, a complicated theory of ownership deprived the various coparceners of exclusive control or authority over the property of the family or to partition it to advantage. An important feature of the sastra was its obsessive concern and solicitude for the power, status and prestige of the father. It was not necessary that fathers, sons and agnates live together in actual jointness. There was a considerable social variety of joint family life. The sastra did not portray either a prototype or ideal type. It presented a picture of the lines of influence, including control over property while emphasizing a sense of belonging of all. Questions of social and spiritual influence were merged with those of power and authority, control of property being one such important power and influence. Indian notions of ownership explicate this social understanding of property rights. As a modern student of the Indian concept of 'ownership' (svarvam) explains:

Indian jurists did not attribute to property a definite incidental content. There might be several owners of a thing owning not merely shares, but extensive rights of different characters... (They seem to ask): what point is there in defining the owner of some rights over a thing as owner and the owner of other rights a something, other than owner: particularly when the word "owner' implies nothing more than 'belonging", "mastery" and the like? It is relevant to note here that the fluid, syncretic, non-disjunctive approach to ideas and phenomenon is notoriously character- istic of Indian thought, gradually merging and broad identities being far more congenial even to their category minded attitudes than the staccato separation of things which share a characteristic.

Such a concept of property is not concerned with the relief that might be. obtained from law courts in defense or for the protection of property. It seeks to do more than simply answer the question: what relief would a court give if asked to ascertain, determine or decide a property right. It is concerned with both the factum and the social significance and influence or ownership. It creates a wider sense of belonging both within the group and in respect of its property. But this property and power structure-of which the eldest male family was the custodian-was vulnerable on two important counts. The first was the threat of marriage and the second the advent of children. Marriages took place within varnas, with strong consequences as to inheritance and property rights where they took place outside the prescribed node. Here, there was an amazing range of possibility that was foreseen by the sastras who devised a variety of complex schemes to deal with the actual possibilities of digression and transgression, taking care to distinguish the two. They seemed to say "Marry, get involved or run away with my son or daughter, by all means; but, this will neither bring you status nor inheritance". Thus, there are eight kinds of marriages, divided into approved and unapproved forms. And, since the sastra could not really forbid what it did not approve, it merely prescribed different consequences for each kind of marriage. Equally, important was the institution of sonship. As important as 19 marriage, the elevation of sonship to the level of an institution of immense religious significance had the effect of placing women outside the power, and, in the main, property structure of civil society. Women were to be respected and cared for. They could also own property which they carried into the families into which they were married. But they were really the beneficiaries of the power and property structure with a decisive influence in some important fact situations when the son wished to partition with the father or where a widow adopted a son with consequent effects on the property rights of other coparceners. Typically, in order to accommodate the premium placed on sonship, the sastra distinguished between twelve kinds of sonship attributing a varying juridical significance in cach case or classes of cases. Adoption became an important power to induct someone in the family with the consequent effects of depriving or diminishing the rights of others in the family, 20 Within these limitations the joint family encap- sulated a tremendous and almost unassailable power As jurisprudence, the sastra did not just concern itself with legal concepts about the family. There are

very sophisticated clucidations of self-standing concepts like debt, bailment, contract, possession, surety-ship. But the mere existence of these legal concepts did not make them vehicles for individualism. In the main, the sastra operated in the context of a mature agrarian economy, underpinned by the family and family

Ownership of property as its pivotal feature

Third, the various prescriptions of the sastra existed independent of the state. The state, rather kingship, is recognised as a juridical institution. The relationship between the state and civil society is variously described by different smritikars and commentators. Some argue for a strong state: others, not so. But the state is not an exclusive limitless institution with the power and authority to displace the imperatives of the sastra at will. The sastra did not draw authority from the state. Much rather it was the king who drew authority from the sastra. Faced with the circumstances of kings, the sastra enveloped the king in dharma. There was a duty to obey the king; but that duty was not greater than the duty of the king to obey dharma. There is a considerable modern controversy as to whether the sastra sought to limit the king on the basis of a real or assumed contractarian compact? and whether there is the right to revolt against an unrighteous king.

It is pointless to get drawn into those long arguments about the nature of the Indian state before the advent of the British. Some of those very weighty intellec- tual arguments were part of India's Independence movement. They dwell upon the tradition of political philosophy in India, seeking to countermand the arrogance of the empire which, in its structure, working, bias and stated and unstated rhetoric presented the Raj as bringing civilization and modernity into India. A well documented, but angry, response presented this arrogance as an absurd and ignorant travesty. This was not simply to show the wonder that was India': but. at a more sophisticated level to demonstrate reasoned principles of state craft and political thingking, no less exacting than the dialogues of Plato and in certain instances committed to principles of republicanism and democracy Those . arguments cannot be dismissed as nationalist expostulation. But, they have to be placed within the context within which the earlier sastric discourses occurred while also mindful of their universal relevance. Thus a famous passage in the Mahabharata states:

The king is more dead than alive in whose kingdom women are easily abducted from the midst of husbands and sons, uttering cries and groans of indignation and grief. The subjects should arm themselves for slaying the king who does not protect them, who simply plunders their wealth, who confounds all distinctions, who is incapable of taking their lead, who is without compassion and who is regarded as the most sinful of kings. The king who tells his people he is their protector but who does not or is unable to protect them should be slain by his combined subjects like a mad dog,

But this right existed because the king was a bad king, answerable to his subjects and eventual fate (or karma). One modern commentator goes further to assert that "from the doctrine deduced by the interpretors from the totality of the smriti, the king appears to owe his authority neither to the divine will, nor to his 24 birth, nor to any social compact but solely to the force at his disposal." This is an over-statement. The king was a part of civil society not a Leviathan like colossus towering over it. The sastra did not surrender sovereignty to the king, but the sastra did conceptualize an institutional concept of state which drew support and prestige by virtue of its being a necessary and proper non-exclusive civil institution.

The king (or state) did not necessarily have a duty to enforce the sastra although it was considered prudent and statesman like for the king to act according to the sastra and unhold the varna system.25 Although a violation of the prescrip- tions of vyavahara or usage led to one of the titles of law,26 the secondary rules of procedure did not depend on the king for enforcement even though the titles of vyavahara acquired a distinctness almost amounting to autonomy and were also addressed to the king. The king may have stepped in to impose his authority and 27 to make courts ordained by the king authoritative spokespersons of the sastra. This is nicely explained by Narada who virtually invites the king to take over on the basis that the "practice of duty having died out among the mankind, actions at law have been introduced and the king has been appointed to decide them because he has the authority to punish. "270 The king was endowed with the power of punishment according to the principles of dandaniti (principles of punishment or the rod). Many a king may have claimed that his courts of law should have exclusive rights to pronounce with authority on the sastra. But, until the advent of the British, no such exclusive take-over was ever permitted or occurred. Civil society remained securely in control, with authority for the sastra continuing to rest in the dharmasastris (whether smriti or nibandkars). Whether this triumph of the jurists did or would have failed and faltered in the face of a strong authoritarian state is speculative. All the evidence points in the direction of civil society never having quite surrendered the custodianship of the sastra to the king or state. This is inspite of the fact that state judicial system may, indeed, have existed; and there is a scatter of evidence of judges deciding according to the sastra. Likewise the king's power to generally legislate for his people could not displace the sastra. Such a power was limited 2 It could not interfere with the dharmic rules or custom operative in civil society except by way of providing recognition to such regula- tions that were agreed by common consent. In actual practice, powerful kings did not just give commands but also legislated. But the sastric understanding of the 'kingship' as an institution gave it lesser primacy of place, choosing to warn and king to respect and preserve rather than supplant the dharma of civil society, of which kingship was itself a part.

Fourth, the sastra holds a diversity of briefs on religious institutions. There is no uniform consideration of religious institutions as mandatory sastric institu- tions. This is in keeping with a permissible variety in the form of worship. Under the sastric law of gifts, dedications could be made for public benefit including the founding of temples or dedication of wells, tanks, parks and so on. Religious institutions in the form of temples of worship or maths (monastries) of learning emerged with incalculable variety. They were the recipients of property; and centres of worship, learning and resistance. Important juristic questions about the nature of these institutions, the legal personality of the idol and the relative power of the shebait or mahant as manager trustee of a temple remain. Later on, in this century, a judgment of the Privy Council was to proclaim the juristic personality of the idol while clothing the managers of religious endowments with the powers of a trustee.30 However, the sastric texts are less clear. Whatever controls existed, they were customary. Fines and severe punishments were imposed on those who broke into or defiled temples." But all this neither added to the assumption of sovereign power over these institutions by the king nor prescribed any other kind of control over them by way of specific responsibilities. The British assumed that they exercised no more than the powers of "former rulers... to visit endowments of this kind and redress abuses in their management." 32 In actual fact, no such powers were sanctioned or indicated by the sastra. Whatever controls were

developed were done by way of customary development. The endowments were theoretically free to pursue whatever course they wanted, on the assumption that they were associated with dharma and not amenable to control. This is not to suggest that control over them was not exercised, but to point to the relative silence of the sastra on the manner in which such endowments were internally or externally controlled as civil institutions. This proved to be an advantage. Exter- nally, kings felt impelled to rush to the rescue of such institutions. Internally, such institutions acquired an amazing and powerful autonomy to preserve Hinduism and the sastra in whatever way they wanted. But these institutions were not formally assigned any particular role on which the fate of the faith depended. "While religious institutions could exist - and it was salutary that they should the Hindu faith was theoretically not an institutionalized faith or established neces- sarily through institutional means.

The judicial usurpation of sastric interpretation can theoretically be traced to the legal obligation of British courts to decide according to justice, equity and good conscience.38 This well known clausula was not directly used to introduce English common or chancery law. In fact, the courts interpreted it as requiring them to apply native law. English judges-or judges schooled in English tradi- tions - interpreted native laws from the hindsight of English legal traditions. But, the first charge was to interpret native law. This had very important consequences. In the first place, judges (of the Raj)-for the first time in the history of India-became the authoritative (and exclusive) custodians of the sastra. Hence- forth, most legal commentators and textbook writers did not concern themselves with the sastra but how courts in British India would interpret them. Learning about the sastra became court centred in a way in which it had never been before.

This had the further inevitable effect of the interpretation of the sastra being litigation centred. In other words, each interpretation became dispositive in nature to achieve a litigational result. Judges, too, began to interpret the sastra according to the exigencies of the case. And, where the judges had to decide important matters which affected the political economy as a whole, the interpretation of the sastra was twisted and turned accordingly. If scholastic learning about the sastra was at its ebb, the form, substance and manner in which the custodianship of the sastra was reposed in British judges as part of the administration and governance of the Empire was bound to bring such scholastic learning to an inconsequential halt. In time, scholastic learning in the sastra became otiose. It was irrelevant. More so, in the context of the civil resolution of disputes for which it was, perhaps, hitherto, relevant and consequential. That entire world of the relationship between sastric learning and civil society was incrementally but swiftly lost. The transition was brisk, harsh, definitive and complete. The structural conditions in which the sastra was interpreted were fundamentally altered and straightjacked.

British judges had a distinct choice to make when they decided to use the sastra as the basis for the determination of issues related to Hindu law. In fact, in a celebrated late nineteenth century controversy,-an English district judge- J.H. Nelsen-presented the awkward fact that dharmasastra was not the true and real law of the Hindus. The law in the mofussil (district) was, allegedly, entirely different.39 Nelsen's pronouncements were met with decisive severity. Not only was Nelsen deprived of promotion, but the idea of deciding according to mofussil law was, itself, dismissed as farcical. What Nelsen said is, no doubt, true of any legal system. There is not only a lack of congruence between law as declared statement and law as practised; but. 'law ways of people often stem from entirely different sources and inspirations than the stated law. Nelsen sought to argue for more than a lack of congruence between the sastra and Hindu society. This was brushed aside for practical and far-sighted reasons. Practically, assuming respon- sibility for discovering the law of the mofussil was an invitation to confusion, inconsistency, corruption, and absurdity. Leaving open the door for any litigant to prove custom,40 British courts chose to concentrate on the sastra. Custom would be proved; but was taken with a pinch of salt as a litigational fabrication in most cases. As a Bombay judge put it "In this country, it is no uncommon experience to find the custom alleged to be that which for the moment is convenient to those who assert its existence that it should then be. I have known the most conflicting customs to be from time to time asserted to exist in one and the same sect. We find it necessary to scrutinise the evidence of the custom."41 The British found it much easier and salutary to invent schools of Hindu law for particular parts of the country as demonstrated by commentators from various different regions. The sastra was important.

The first and most important sastric institution that underwent transformation was the joint family; and the nature and incidence of power and property relations therein. Anglo-Hindu law concretized notions of ownership' in joint family situations in ways that were alien and divisive. To Indian notions of 'ownership' as a broad claim of control, influence and responsibility was introduced the idea of concrete severable individuated rights. By introducing the notion of the son's co-equal coparcenary right in joint family right which devolved on each. comparcener by survivorship, the stage was set to convert the joint family into, what an English judge from Bombay recognised to be a movement to represent the joint family as, "a voluntary partnership." This was despite the fact that due recognition was given to the fact that jointness implied not just jointness in the matter of the ownership of property and estate but also food and worship.+ However, such a concession to the spiritual and social nature of the joint family was legally meaningless.

As soon as the son's interest as a coparcenary were profiled for specific and special attention, a pandora's box for the social re-determination of property rights was laid open. Inevitably, this created a new divisive mobility within families. This had considerable repurcussions on the political economy as a whole. Coparceners not only partitioned their shares but pledged them to money lenders. Greater stakes in joint family property were provided for a wider range of people in the new context who were legally inducted into the affairs of the joint family. Consider the implications of what happened. The right to partition emerged as a concrete right enforced in British Indian courts. This stressed the co-equality of the coparceners, making divisibility a concrete possibility. Co-equality as a distinct enforceable power also had an important effect on the line of moral authority and social control which was assumed as a matter of course of the father or karta (manager) even if it had been breached within families throughout the ages. The recognition of an enforceable right to partition quickened the pace with which the re-determination of property rights within the family were sought. Anglo-Hindu law went further. If a partition could be granted, it followed that an undivided share could also be alienated to a bona fide purchaser for value. And, having come thus far, a coparcener's share could also be seized in execution of a decree of a court provided that the coparcener was still alive.

Thus coparcener's shares could be bought and sold provided a coparcener was willing to sell; and, even if unwilling, could be

made to sell if he was in a state of indebtedness and his debts were not satisfied. In advance of the propositions that coparcenery shares could be aliented and executed to satisfy a decree, Anglo-Hindu law had already agreed that such shares could also be willed by way of testamentary disposition. Further fissures were made in the concept 47 of joint family property, when the Privy Council virtually created a distinct notion of the self-acquired property of the father which passed on by succession rather than survivorship. 48 Such property could be alienated by the father without reference to the sons and other coparceners against clear texts which gave the son 49 rights in such property. Having gone thus far in contradistinction to the sastric text, British courts followed a curious line of decision making and reasoning, when in a famous case, the Privy Council decided that the salary of an Indian Civil Service (ICS) officer belonged to his family because they had paid for his education and training. This was done oblivious of the fact that in previous. decisions the court had taken liberties with the sastric and were conscious of the circumstances that even if such a rule did exist it "...had its origin in a state of society possibly simpler than and different from the state of society existing in the present day. This decision is clearly out of line with the other decisions both in the matter in which Anglo-Hindu law perceived joint family relations and property as well as its relative imperviousness to sastric text when the occasion arose. The general trend was to individuate power, authority and property rights. Consistent with this the manager (karta) of joint family property was also pushed into a position of greater legal accountability. Written into the exercise of power 31 of the karta were English chancery notions of trusteeship with a duty to account for improper but not imprudent use.

This, in turn, gave rise to litigation.. Although Anglo-Hindu law made the father more vulnerable in the hands of his sons, he retained considerable powers. Unlike a trustee, he was not under an obligation to economize or save. He could alienate joint family property for necessity, including his own moral debts," Joint family property could be ex- ecuted in decree for a father's debts and burdened by way of mortgage for his antecedent debts.55 The import of the intervention of Anglo-Hindu law was not to favour the sons against the father or place them in a potentially more advantageous position (including such advantages as flowed from their nuisance value), but, more generally, to individuate power, property and individual rights while accept- ing 'jointness' as the principle of ownership and togetherness from which devia- tions could be made. The general rule was powerfully stated in 1866:

According to the true notion of an undivided family in Hindu law, no individual member of that family while it remains undivided, can predi- cate of the joint and undivided property that he, that particular member, has a certain and definite share. The proceeds of undivided property must be brought, according to the theory of undivided family to the common chest or purse, and there dealt with according to their modes of enjoyment by the members of the undivided family."

What has handicapped Indian development has been dishonesty and a want of true belief in the rule of law amongst the public at large. There is no sense of public spirit except at a xenophobic level. Honesty in this sense operates only inside groups not across them. This is a negative side of the achievement of India, peaceful co-existence. The profitability of honesty across groups is still being discovered and who knows how long it will take to become a virtue.

CONCUSSION

The truth is that the institutions of the modern state cannot survive simply because they are necessary or convenient. To the extent to which they are necessary, civil society has no choice but to use them. Once in the arena, a concerted attempt is made to manipulate them. To the extent that the use of these institutions is convenient, they are ruthlessly used without any concern about the system as a whole. This has been responsible for wide scale corruption, itself spurred on further by the spoils of development and economic change. It also explains the tremendous overload on all state institutions, whether they be Parliament, law courts or bureaucracy. What has been wholly ignored is the reason for the existence of the overall structure of modern government and of each institution. Unless India's public system of governance is accepted as an act of civil faith, it will remain highly vulnerable to extreme dy sfunctionality. Ultimately, the demands of everyday life will induce-as they are doing already-some kind of rational acceptance of public governance for what it is. As things stand at present. the public system of governance remains operationally fragile. It has yet to acquire social validity in the minds of people or achieve a mature relationship of co-existence with other plural orderings over which it has formally triumphed but which threaten its viability. To that extent, the sastra lives on as both sentiment and powerful practice, spurred on by the electoral politics of state.